Franchises — Extent of City's Authority — Conditions Against Alienation.— The Superior Court of San Francisco, through Judge John F. Ellison, of Tehama county, has decided that the condition, in the franchise grant by the supervisors of San Francisco to the Home Telephone Company, against alienation of the grantee's property and rights to any competitive company, was, under the circumstances of the grant, beyond the powers of the supervisors and consequently ineffective.[1]

The City and County of San Francisco on October 3, 1906, granted a franchise to the Home Telephone Company to construct and operate a telephone system in the city and county. Among the provisions of the grant was the following stipulation:

"That said grantee, his or its successors or assigns, shall not, without the consent of the City and County of San Francisco, evidenced by ordinance duly passed by the Board of Supervisors thereof, sell or transfer its property or any rights or privileges authorized or granted it by said franchise to any person, company, combination, trust or corporation now engaged in the telephone business in the City and County of San Francisco, and shall not at any time enter into any agreement directly or indirectly with any person, company, combination, trust or corporation now engaged in the telephone business in the City and County of San Francisco."

The action is based on the violation of this clause of the grant. The grantee, after constructing its telephone system and operating it for several years, attempted, on March 15, 1912, to transfer all its properties, except its franchise to operate a telephone system, to the Pacific Telephone & Telegraph Company. The suit is now to set aside this conveyance.

The vital question is whether this condition against the sale of its properties to a competitor was a valid condition.

There is no procedure laid down in the San Francisco charter for granting telephone franchises. Further, the provisions that are in the charter for granting franchises, being specific for certain purposes, as for street railways, negative any implication of authority in the supervisors to grant a telephone franchise thereunder. It may well be inferred that the granting of a telephone franchise is a "municipal affair,"[2] and the power might be exercised by the supervisors if authority were conferred on them. But it is a well settled construction of § 6 of Article XI of the constitution, that a city, if there be neither general law nor charter provision with respect to a certain municipal affair, has no power to legislate with reference to such municipal affair. And a general law with respect thereto can only be superseded

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[1] City and County of San Francisco v. The Pacific Telephone & Telegraph Co. et al., in the Superior Court for the City and County of San Francisco; decided November 12, 1912. (The Recorder, San Francisco, November 25, 1912.)

[2] Sunset Telephone & Telegraph Co. v. Pasadena, 1911), 161 Cal. 265, 118 Pac. 796.

by a distinct provision in the charter.[3] There was in force a general law (Stat. 1905, p. 777), covering the granting of franchises by municipalities, which opened in this way: "Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires . . . shall be granted upon the conditions in this act provided, and not otherwise."

This statute of 1905 was the only authority under which the city could grant a telephone franchise, and it is evident from the facts in the case that the supervisors followed the procedure laid down in this act, except in the one particular of adding the condition against alienation. Not only was this act the measure of authority for the action of the supervisors,[4] even if it had had no prohibitive provisions, but the act itself precludes by its very terms a city, which assumes to act under its authority, from transcending its provisions. Furthermore, § 540 and § 361 (a) of the Civil Code provide for the alienation of their property by corporations, and telephone and telegraph companies are specifically mentioned.[5] Reading these provisions of the Civil Code with the general statute of 1905, the argument against the attempt of the City and County to insert a condition forbidding alienation is further strengthened.

The decision of Judge Ellison was that the complaint did not state a cause of action, and seems unescapable under well settled rules of law. The City and County of San Francisco might have made provision in its charter for the granting of franchises on such terms as it chose; but when it did not make any such provision, but left its supervisors to get their authority from the general statute, the supervisors were powerless to go outside the limitations of such authority. If they could add one condition, they could add more and more conditions, until the franchise purported to be granted was something quite different from that contemplated by law. The only alternative that was before the supervisors was to refuse to grant any franchise or to grant one in accordance with the law. Every superadded term or condition was nugatory.[6]

W. C. J.

Interstate Commerce — Federal Employers' Liability Act.— The first Federal Employers Liability Act[1] was declared unconstitutional because it created a liability in favor of all employees of a railroad engaged in interstate commerce, whether the employees were engaged in such commerce or not.[2] The present act was then passed placing

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[3] Fragley v. Phelan (1899), 126 Cal. 383, 58 Pac. 923.

[4] Clouse v. City of San Diego (1911), 159 Cal. 434, 114 Pac. 573.

[5] South Pasadena v. Pasadena Land & Water Co. (1909), 152 Cal. 579; 93 Pac. 490.

[6] City of Arcata v. Green (1909), 156 Cal. 759, 106 Pac. 86.

[1] U. S. Comp. St. Supp. (1909), p. 1148.

[2] Employers' Liability Cases (1907), 207 U. S. 463.